UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BETHANY COLLEGE

And **Case Nos. 14-CA-201546**
14-CA-201584

THOMAS JORSCH, an Individual

And

LISA GUINN, an Individual

GENERAL COUNSEL'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Counsel for the General Counsel respectfully files this response to Respondent's Exceptions to the Decision of the Administrative Law Judge with the National Labor Relations Board. This is before the Board based on a Complaint that Bethany College (Respondent) violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act). The Consolidated Complaint and Notice of Hearing was issued by Region 14 on August 30, 2017, alleging Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule, by asking employees not to disclose a proposed tenure plan, by sending an email prohibiting employees from discussing terms and conditions of employment with each other, and by informing employees they were being terminated for engaging in protected, concerted activities. The Consolidated Complaint and Notice of Hearing alleges Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by discharging employees Thomas Jorsch and Lisa Guinn for engaging in protected, concerted and Union activity and to discourage employees from engaging in protected, concerted, and Union activity. Hearing was held before Administrative Law Judge Christine Dibble on December 6, 2017.

Prior to hearing, Respondent through its Answer and through a Pre-Hearing Motion to Dismiss/Motion for Summary Judgment, argued the Board lacked jurisdiction due to Respondent's status as a religiously-affiliated college. Respondent claimed that it could not participate in any Board proceedings without waiving its jurisdictional arguments. Respondent also filed Petitions to Revoke subpoenas based in part on these same grounds. Respondent raised the jurisdictional issues again at hearing when, through counsel, Respondent affirmed on the record that due to its jurisdictional arguments it would not participate in the hearing and would not produce subpoenaed documents or subpoenaed witnesses.

Following submission of briefs by the parties, Judge Dibble issued a decision, dated October 31, 2018, in which she concluded Respondent violated the Act as alleged. Respondent subsequently filed Exceptions to the ALJ's decision.

I. General Counsel Urges the Board to Re-Consider Pacific Lutheran

Throughout the proceedings, Respondent alleged the Board lacked jurisdiction over Respondent due to Respondent's status as a religiously identified college. If the Board determines that it is appropriate to reconsider the jurisdictional issue at this procedural juncture, the General Counsel's the position is that the Board should change its approach for determining whether to assert jurisdiction over religious colleges and universities. The standard set forth in *Pacific Lutheran University*, 361 NLRB 1404 (2014), fails to adequately respect the religious rights of these institutions, as enshrined in the free exercise and establishment clauses of the First Amendment. *Pacific Lutheran*'s two-part test inquires: (1) whether a university holds itself out to students, faculty, and the community as providing a religious educational environment as a threshold matter and, if so, (2) whether the university holds out its petitioned-for faculty members as performing a specific role in creating and maintaining a religious educational environment. *Id.* at 1409-10. In the General Counsel's view, application of the second prong of this test inappropriately allows the Board to probe intrusively and unnecessarily into how a university carries out its religious mission. *See University of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002) (rejecting the Board's pre-*Pacific Lutheran* test because it "subject[ed] the institution to questioning about its motives or beliefs[,] . . . ask[ed] about the centrality of beliefs or how important the religious mission is to the institution[,] . . . [and] ask[ed] how effective the institution is at inculcating its beliefs").

In lieu of the *Pacific Lutheran* test, the General Counsel urges the Board to adopt the D.C. Circuit's three-part inquiry set forth in *Great Falls*. Under that standard, a school can establish its *bona fides* as a religious institution if it: (1) holds itself out to students, faculty, and the community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization or with an entity, membership of which is determined, at least in part, with reference to religion.[1] 278 F.3d at 1343. This *Great Falls* test guards against potential abuse of the jurisdictional exemption "without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands." *Id.* at 1345.

Applying the *Great Falls* test here, the Board should not assert jurisdiction over non-tenured faculty employed by the Respondent. It is undisputed that the Respondent holds itself out to the public as providing a religious educational environment, and it is organized as a Section 501(c)(3) not-for-profit corporation. Furthermore, the third prong of the *Great Falls* test is met here given that the Respondent is a ministry of the Evangelical Lutheran Church in America

[1] We note that some of the third prong's factors have been criticized as possibly inviting religious discrimination. *See Spencer v. World Vision, Inc.*, 633 F.3d 723, 732-33, 741 (9th Cir. 2011) (O'Scannlain, J., concurring, joined by Kleinfeld, J.) (in assessing whether organization qualifies for exemption from Title VII's ban on religious discrimination, court was "disinclined to afford [the affiliation factor] much weight in light of potential it presents for discrimination amongst religious institutions"). For example, highly religious but unaffiliated schools (e.g., *see Jewish Day School of Greater Washington*, 283 NLRB 757 (1987)), which should be entitled to First Amendment protection, could be found insufficiently "religious" under a strict reading of the *Great Falls* test. This concern might explain why the D.C. Circuit left open the possibility that "other indicia of religious character might replace 'affiliation' in other cases." *Great Falls*, 278 F.3d at 1347 n.2.

(ELCA), owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod of the ELCA.[2]

If the Board opts to use this case as a vehicle to reconsider the jurisdictional issue, the General Counsel's position is that the Board should replace the *Pacific Lutheran* standard with the D.C. Circuit's *Great Falls* standard and, accordingly, conclude that the Board lacks jurisdiction over the Respondent.

II. Alternately, Should the Board Not Reconsider Pacific Lutheran, the ALJD Should Be Fully Upheld

Should the Board in its wisdom opt not to use this case as a vehicle to reconsider the jurisdictional issue, the General Counsel's position is that the Administrative Law Judge's decision should be sustained in all aspects.

Argumentation in this brief will follow a different structure than Respondent's Exceptions. Respondent's Exceptions consist of two documents: a document containing Respondent's numbered Exceptions and a brief in support of Respondent's Exceptions ("Suggestions in Support of Exceptions). The numbered Exceptions set forward in the Exceptions document do not correspond, by number or by subject matter, with the order of Exceptions set forward in Respondent's "Suggestions in Support of Exceptions." Based on Respondent's Exceptions document, Respondent is taking exception to every single decision made by the Board or the ALJ throughout these proceedings. Most of Respondent's Exceptions

[2] Given that the Respondent clearly is affiliated with the Evangelical Lutheran Church, this case does not necessarily require the Board to determine the precise meaning of "affiliation," or of "indirect control," that would meet the third prong of the *Great Falls* test. We note, however, that establishing the meaning of those terms, which were not clearly defined in *Great Falls* itself, is a potential difficulty with the *Great Falls* test that may require some refinement.

are based on Respondent's consistent, incorrect assertion that following the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Board was barred from asserting jurisdiction over religiously-affiliated schools, despite significant case law demonstrating differently. This brief in support of the ALJD will first address the jurisdictional argument and then will follow the structure of the ALJD rather than the structure of either of Respondent's Exceptions filings.

A. Respondent's Jurisdictional Arguments Are Not Based on Board Law/Precedent

1. Prior to Pacific Lutheran the Board followed the Substantial Religious Character Test

Pacific Lutheran represents an attempt to refine the Board's jurisdictional test for religiously-affiliated colleges and universities. Before *Pacific Lutheran*, jurisdiction over all church operated schools, regardless of whether the school was a preschool or a university, was determined based on the "substantial religious character" test adopted after *Catholic Bishop*. The Court in *Catholic Bishop* determined that the Board should not exercise jurisdiction over a school with "substantial religious character" so post-*Catholic Bishop*, the Board made jurisdictional determinations by deciding on a case-by-case basis whether a religiously-affiliated school had a substantial religious character. The Board's decision to refine this test for colleges and universities was based on the significant size, organizational, and operational differences between colleges and universities and other types of church-operated schools.

A fairly thorough discussion of the substantial religious character test is included *University of Great Falls and Montana Federation of Teachers*, 331 NLRB 1663 (2000). The Board wrote, "The Board has not relied solely on the employer's affiliation with a religious organization, but rather has evaluated the purpose of the employer's operations, the role of the

unit employees in effectuating that purpose and the potential effects if the Board exercised jurisdiction." *Great Falls*,1664-65.

Under the substantial religious character test, the Board reviewed, among other factors,

- The degree of the school's religious mission;
- The school's organizational structure;
- Whether the school educates individuals regardless of their faith or limits its enrollment to those adhering to the school's religion;
- The nature of the required religious courses paying particular attention to whether instruction in the school's specific faith is a significant part of the curriculum;
- Whether the school provides a comprehensive secular education, and if so, whether this or the religious component predominates;
- Whether faculty members are required to adhere to any particular religious faith or conduct themselves in accord with religious tenets; and
- The school's significant funding sources.

The Board also considered such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for appointment and evaluation of faculty." *Great Falls*, 1666. The Board could consider, "on a case-by-case basis, all aspects of a religious school's organization and function that [it deems] relevant." *Trustee of St. Joseph's College*, 282 NLRB 65, 68 n. 10 (1986). Like *Pacific Lutheran*, the substantial religious character test required the college or university contesting jurisdiction to make the necessary evidentiary showing to establish lack of jurisdiction.

2. The Board Never Adopted the Great Falls Test

The DC Court of Appeals, reviewing the Board's decision in *Great Falls*, subsequently proposed and applied a different three-step test. Although Respondent's jurisdictional arguments rely heavily on the DC Circuit's test, prior to *Pacific Lutheran* the Board neither adopted nor rejected that test. However, in *Pacific Lutheran*, the Board openly rejected the DC Circuit's test. *Pacific Lutheran*, 1409. Accordingly, the DC Circuit's *Great Falls* test has never been valid Board law. While Respondent is certainly able to advocate for this test, Respondent's burden, as referenced above, is to make the necessary evidentiary showing to establish lack of jurisdiction under the existing test, which is this case is *Pacific Lutheran*.

3. All Jurisdictional Tests Have Required Employers to Present Evidence

Respondent's arguments throughout the proceedings have completely ignored the fact that all Board tests post-*Catholic Bishop* have required employers claiming lack of jurisdiction to establish lack of jurisdiction through presentation of witnesses and evidence. At no point, under any Board test, has an employer's mere assertion that the Board lacked jurisdiction been sufficient. It must be emphasized that Respondent's only participation in this case has been through its pre-hearing and post-hearing filings. Respondent was represented by counsel and so knew, or should have known, the risks of failing to participate in the hearing, failing to present evidence and witnesses, and failing to build a record upon which its claims could be evaluated. Respondent filing Exceptions after completely refusing to participate in hearing is rather disingenuous. ALJ Dibble's decision was based on the evidence and arguments presented at hearing. If Respondent desired a different result, Respondent should have presented the evidence necessary to support its claims and arguments.

B. The Board Correctly Denied Respondent's Motion to Dismiss/Motion for Summary Judgment

Counsel for the General Counsel notes denial of Respondent's Motion to Dismiss/Motion for Summary Judgment was issued by the Board, not by the ALJ, and is therefore not part of the ALJD. However, Counsel for the General Counsel will address the issue because it was raised in Respondent's Exceptions.

As is the case with most of Respondent's arguments, Respondent's Motion to Dismiss/Motion for Summary Judgment was based on Respondent's contention that Respondent as a religiously-affiliated college/university is outside of the Board's jurisdiction. The Board was created by Congress to carry out the policies contained in the Act. As such, "the Board has the duty of determining in the first instance (the jurisdiction) of the National Labor Relations Board and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law." *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947). As noted in Counsel for the General Counsel's brief opposing dismissal/summary judgment, unless an employer falls within a clear exception to the Act, such as a state or local government, the Board's determination of jurisdiction is not made solely as a matter of law but is a mixed question of law and fact. The necessary fact-intensive analysis to resolve these issues can only be accomplished through hearing before an ALJ and creation of a full and complete record. An evidentiary record must be created before it can evaluated to determine jurisdiction. As jurisdiction involves mixed questions of law and fact, the denial of Respondent's Motion to Dismiss/Motion for Summary Judgment was correct and appropriate and Respondent's Exception on this point should be denied.

C. ALJ Dibble Correctly Denied Respondent's Motion to Revoke General Counsel's Subpoenas

Respondent argues that since it contested the Board's jurisdiction, it should not have had to comply with Counsel for the General Counsel's subpoenas and that ALJ Dibble should have upheld Respondent's Motion to Revoke. Respondent also argues that it is not required to comply with Counsel for the General Counsel's subpoenas unless/until Counsel for the General Counsel seeks enforcement of the subpoenas in Federal District Court.

The Board is authorized under Section 11(1) of the Act to subpoena "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 1982). In fact, Section 11(1) of the Act specifically provides that the Board shall revoke a subpoena only:

> if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.

Relevance requires a fairly low threshold showing. Subpoenaed information must be produced if the information sought is "not plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943); *see also General Engineering, Inc.*, 341 F.2d 367, 372 (9th Cir. 1985). Thus, a subpoenaed party must produce subpoenaed information that relates to matters in question, that can provide background information, or that can lead to other potentially relevant evidence. *Perdue Farms*, 323 NLRB 345, 348 (1997), *affd. in relevant part*, 144 F.3d 830, 833-34 (D.C. Cir. 1998). The Board's authority to subpoena evidence includes the authority to subpoena evidence concerning

anticipated defenses. *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1008-09 (9th Cir. 1996); *see also NLRB v. Dutch Boy, Inc.*, 606 F.2d 929, 933 n.4 (10th Cir. 1979).

Respondent's argument that its religious affiliation renders Counsel for the General Counsel's subpoenas invalid is completely inconsistent with Board precedent. Where the Board's jurisdiction is not plainly lacking, a Respondent's denial of jurisdiction does not provide grounds for revoking a hearing subpoena. *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 1002 (9th Cir. 2003). As noted above, jurisdiction was not plainly lacking in this case and the standards for evaluating Respondent's jurisdictional arguments require the presentation and analysis of evidence and subsequent findings of fact. The analysis to determine whether Respondent as a religiously-affiliated higher education institution is within the Board's jurisdiction and the analysis to determine if Thomas Jorsch was a managerial employee requires the very evidence Counsel for General Counsel sought to obtain via subpoena. It is clear that ALJ Dibble's denial of Respondent's Motion to Revoke Counsel for the General Counsel's subpoenas was correct and appropriate and Respondent's Exceptions on this point should be denied.

D. ALJ Dibble Correctly Applied Evidentiary Sanctions

Authority to sanction a party for non-compliance with any Board subpoena is a matter committed in the first instance to the judge's discretion. *McAllister Towing*, 341 NLRB at 396; *Teamsters Local 19 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005); *NLRB v. American Art Industries*, 415 F.2d 1223, 1229-1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970); *Midland National Life Insurance Co.*, 244 NLRB 3, 6 (1979). Courts have generally upheld the trial judge's authority to issue evidentiary sanctions, and the Board's authority to issue evidentiary

sanctions, even when the General Counsel has elected not to initiate court enforcement proceedings. *Perdue Farms, Inc. v. NLRB*, 144 F. 3d at 834. In most cases, the need for sanctions arises after a party explicitly and deliberately refuses to comply with a valid subpoena. *Essex Valley Visiting Nurses Assn.*, 352 NLRB 427, 440-441 (2008); *San Luis Trucking, Inc.*, 352 NLRB 211, 213-214 (2008).

The trial judge has discretion to impose all or a portion of available sanctions, depending on the circumstances. *Bannon Mills*, 146 NLRB 611, 613 n. 4, 633-634 (1964); *McAllister Towing and Transportation*, 341 NLRB 394, 396-397 (2004), enfd. 156 Fed.Appx. 386 (2nd Cir. 2005); *San Luis Trucking*, 352 NLRB 311, 212 (2008); *Hedison Mfg. Co. v. NLRB*, 643 F.2d 32, 34 (1st Cir. 1927).

It is undisputed that Respondent failed to comply with Counsel for the General Counsel's subpoenas. Not only did Respondent refuse to provide any subpoenaed documents, Respondent's counsel also would not allow two subpoenaed witnesses present for hearing to testify. It is clear and obvious that Respondent failed to comply with Counsel for the General Counsel's subpoenas, and there is no requirement that Counsel for the General Counsel initiate court enforcement of a subpoena before sanctions may be applied. Accordingly, Judge Dibble was well within her authority to apply evidentiary sanctions, the sanctions applied were appropriate and correct, and Respondent's Exceptions relating to sanctions should be denied.

E. ALJ Dibble Correctly Denied Respondent's Motion to Re-Open the Hearing

Respondent affirmatively chose, on the record, not to participate in hearing, but post-hearing moved the hearing/record be re-opened and now takes Exception to ALJ Dibble denying that motion. A hearing record may be reopened if there is newly discovered relevant evidence.

Owen Lee Floor Service, 250 NLRB 651 fn.2 (1980). Under Section 102.48C(1) of the Board's rules, "A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result." "Newly discovered evidence is evidence which was in existence at the time of the hearing, and of which the movant was excusably ignorant." *Seder Foods Corp.*, 286 NLRB 215, 216 (1987). A motion seeking to introduce such evidence must show the movant acted with reasonable diligence to uncover the evidence. *Owen Lee Floor Service*, 250 NLRB 651 fn.2 (1980). It is well established that the record need not be reopened unless the moving party demonstrates the new evidence would require a different result. *NLRB v. Johnson's Industrial Caterers,* 478 F.2d 1208, 1209 (6th Cir. 1973).

In this case, Respondent's Motion did not only fail to meet the criteria set in the legal standard, it failed to even reference the relevant legal standard. Respondent was represented by counsel, and through and by counsel made an affirmative and knowing decision not to produce subpoenaed witnesses and documents and not to take part in hearing. Respondent did not offer any newly discovered evidence as part of its motion, but merely tried through its motion to put on evidence that could have been presented at hearing and entered into the record. ALJ Dibble applied the relevant legal standard and denied Respondent's motion. Respondent's Exceptions on this point should be denied.

F. ALJ Dibble Correctly Applied Pacific Lutheran

Respondent takes Exception to ALJ Dibble's application of *Pacific Lutheran*. The ALJ is bound to apply established Board precedent which neither the Board nor the Supreme Court has reversed, regardless of contrary decisions by courts of appeals. *Pathmark Stores, Inc.*, 342 NLRB 378 n. 1 (2004).; *Waco, Inc*., 273 NLRB 746, 749 n. 14 (1984); *Los Angeles New*

Hospital, 244 NLRB 960, 962 n. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981). ALJ Dibble's application of *Pacific Lutheran University*, 360 NLRB 1404 (2014) is consistent with this obligation. Respondent's disagreement with the *Pacific Lutheran* decision does not change the fact that as of the date of hearing *Pacific Lutheran* defined the jurisdictional test for religiously-affiliated colleges and universities and the test for whether faculty members are managerial employees. As previously stated, Respondent is free to argue for a different test, but must make its evidentiary showings under the relevant test valid at the time of hearing. As *Pacific Lutheran* was and remains the appropriate test, Respondent's Exceptions on this point should be denied.

G. ALJ Dibble Correctly Found Respondent Committed Unfair Labor Practices

As noted previously, Respondent did not participate at trial and did not present any evidence or witnesses. Because Respondent did not participate and did not in any way rebut the evidence/witnesses presented by Counsel for the General Counsel, it is difficult to understand how Respondent could expect ALJ Dibble to find differently. The unrebutted evidence and witnesses presented at hearing fully support and establish all allegations set forth in the Complaint and demonstrate Respondent violated the Act as alleged. ALJ Dibble's finding that Respondent committed unfair labor practices as alleged is based on and supported by the evidentiary record. Respondent offered no evidence or legal authority as to how, in light of the evidentiary record, ALJ Dibble could have reached any other conclusion. With Respondent's complete refusal to participate in the hearing and no evidence to support any other finding, ALJ Dibble's finding that Respondent committed unfair labor practices is correct and appropriate and Respondent's Exceptions on this point should be denied.

H. *Granting Respondent's Exceptions Undermines the Integrity of Board Proceedings*

Respondent has, during every phase of these proceedings, refused to follow or even acknowledge Board law/precedent, refused to comply with subpoenas, refused to comply with the orders of the ALJ, and refused to participate in the hearing. It would be difficult to find an employer more uncooperative and more obstructive than Respondent. Granting any of Respondent's Exceptions, when Respondent has not made even the most cursory acknowledgement of established Board precedent and procedure would encourage other employers to engage in similar tactics. Respondent made an affirmative and knowing choice not to participate at hearing/create the necessary evidentiary record. Respondent should now have to accept the outcome of that choice and Respondent's Exceptions should be denied in full.

III. Conclusion

For all of the reasons set forth above, Counsel for the General Counsel encourages the Board to reconsider *Pacific Lutheran* and replace it with the DC Court of Appeals *Great Falls* test or alternately to fully uphold the decision of the Administrative Law Judge.

Respectfully submitted,

/s/ Rebecca Proctor
Counsel for the General Counsel

Date: February 6, 2019